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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,

Respondents.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY.

CHARLES W. BUNN,
CHARLES DONNELLY.

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STATEMENT.

Within the place limits of the grant of lands to the Northern Pacific Railroad Company (13 Stat. 365) were included certain lands now forming part of the Mt. Ranier National Park; and when, on March 2, 1899, Congress passed the act creating that park (30 Stat. 993) it was necessary to obtain a relinquishment of the title thus granted. Accordingly, by sections three and four it was provided:

"Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: *Provided,* That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

"Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been

> surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

The proposition thus made was accepted, and the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Central Trust Company of New York executed and filed with the Secretary of the Interior a deed releasing and conveying to the United States all claim to lands within the park thus created. (R. 68.)

June 21, 1901, the Northern Pacific Railway Company filed in the United States Land Office at Coeur d'Alene, Idaho, its selection list No. 61, by which, proceeding under section four quoted above, it selected, in lieu of lands released to the United States, certain unsurveyed lands, describing them as *"tracts of land, which, when surveyed, will be described as follows."* There follows a description of the tracts selected by section, township and range, among them being section 20, township 44 north, range 3 east. (R. 49-54.)

May 15, 1903, the appellant went upon the southeast ¼ of section 20, township 44 north, range 3 east, and thereafter, with occasional intermissions, resided upon it. (R. 28.) At that time this township was still unsurveyed, but the south line of the adjacent township, 45 north, range 3 east, had been surveyed some two years before. (R. 34, 82; Appellant's Brief, p. 3.)

July 17, 1905, the official plat of survey of township 44 north, range 3 east, was filed in the land office at Coeur d'Alene, and on that day appellant tendered his application to enter, under the homestead law, the southeast ¼ of section 20, township 44 north, range 3 east. His application was rejected on the ground that the land had been selected by the Northern Pacific Railway Company. (R. 3, 12, 40, 41.)

July 31, 1905, the Northern Pacific Railway Company filed in the local land office a new selection list, describing the land in question according to the survey. (R. 54.) October 13, 1910, patent was issued to the railway company. (R. 67-70.)

In this suit appellant asks a decree declaring that he is the owner of the land which he sought to enter, and that the railway company and its grantee, the timber company, hold their title to it in trust for him. He grounds his case upon the proposition (Appellant's Brief, p. 5) that "the description contained in the original selection list was not sufficient to describe any particular land or impart any notice."

ARGUMENT.

Some account of the departmental regulations governing selections of unsurveyed lands is necessary to a clear understanding of the questions involved in this case. The Mt. Ranier Act is not the only one authorizing such selections. They are authorized as well by the act of June 4, 1897 (30 Stat. 11, 36) dealing with forest reserves, and by the act of July 1, 1898 (30 Stat. 597, 620) dealing with the Northern Pacific grant; so that before the enactment of the Mt. Ranier Act the Department was met with the necessity of determining how unsurveyed lands selected under

those acts should be described and identified. Accordingly, it promulgated rules governing such selections. The act of July 1, 1898, provided in terms that "all selections of unsurveyed lands *shall be of odd-numbered sections to be identified by the survey when made.*" The departmental regulations governing selections under this act are dated February 14, 1899, and are to be found in 28 L. D. 103,108. They provide:

> "Selections of unsurveyed lands by the railroad claimant are confined to odd-numbered sections or legal subdivisions therein, 'to be identified by the survey when made;' *that is, the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will give identity to the land selected.* Selections of unsurveyed lands by an individual claimant must be designated *according to the description by which they will be known when surveyed*, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of survey come to be extended."

The act of June 4, 1897, is not so explicit as to how unsurveyed lands when selected shall be identified. Indeed it was not until April 14, 1899, when the Department decided on review the first case of *F. A. Hyde,* 28 L. D. 284, that unsurveyed lands were determined to be selectable under that act. This having been determined in that case, however, the Department promulgated regulations May 9, 1899, (28 L. D. 521) which provided:

> "Every selection of unsurveyed land *must designate the same according to the description by which it will be known when surveyed, if that*

> *be practicable,* or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being identified when the lines of public survey come to be extended."

Though the Mt. Ranier Act was passed March 2, 1899, it was not until July 1899, after its relinquishment of its granted lands within Mt. Ranier Park, that the railway company was in a position to make selections under it; and at that time, as we have seen, all of the departmental regulations relating to the selection of unsurveyed lands required that such lands, when selected, should be described and identified according to the description by which they would be known when surveyed. Though framed with specific reference to the Acts of June 4, 1897, and July 1, 1898, they were by their terms generally applicable to any selection of unsurveyed lands, and it was not thought necessary, on the passage of the Act of March 2, 1899, to issue additional regulations. Those already in effect were taken as covering *any* selection of unsurveyed lands. *Hanson v. Northern Pacific Railway Co.,* 38 L. D. 491; *Daniels v. Northern Pacific Railway Co.* (decided by Secretary of Interior Aug. 3, 1914, and printed as an appendix to this brief).

Compliance with those regulations was accepted by the Department as a full compliance with the requirements of the law until February 21, 1908. On that date the Department issued a circular (36 L. D., 278), which was by its terms applicable to all forms of "scrips, warrants, certificates, soldiers' additional homestead rights and lieu selections" of whatever kind; and which provided for the posting on the land of notice of the selection, application, or entry. This regulation, of course, was intended to apply to selections under the Mt. Ranier Act, as well as to selec-

tions under the acts of 1897 and 1898. But it was not intended to have—and indeed it could not have been given—a retroactive operation. This is manifest from the language of the circular itself, which although issued February 21, 1908, provided that "the following requirements will govern *on and after April 1, 1908.*" Indeed, in the very decision upon which appellant places his main reliance—the case of *F. A. Hyde, et. al.*, 40 L. D. 284—it is expressly held that the circular of February 21, 1908, has no retroactive effect.

November 3, 1909, a circular was issued (38 L. D, 287) carrying a new regulation applicable to all cases of selections, filings, and locations upon unsurveyed lands, in which, for the first time, it is required that such selections, etc., must describe the land "by metes and bounds, with courses, distances and reference to monuments," etc., and that the boundaries of the selected land shall be marked out upon the ground. This regulation further provides that "the approximate description of the land by section, township and range, as it will appear when surveyed, must be furnished; or if this cannot be done, an affidavit must be filed setting forth a valid reason therefor." But it was specifically held in *Hanson v. Northern Pacific*, 38 L. D. 491, that this regulation could not be given retroactive effect.

With this summary of the departmental regulations in mind the court will observe that when, in June, 1901, the railway company selected the lands in question the kind of description which it should make of them was not a matter of choice. It was controlled by the regulations of February 14, 1899, and May 9, 1899. Wherever it was possible to describe land according to the description by which it would be known when surveyed the railway company was not merely authorized but required to do so. It is obvious, there-

fore, that to sustain appellant's contention this court must hold *as matter of law* that that description has not a "reasonable degree of certainty," which was not merely accepted by the Department as being reasonably certain in *fact,* but was *prescribed* by the Department, *sua sponte,* as answering most nearly to the law's requirements.

The court below declined to hold this and clearly it was right in doing so. The question whether a given description identifies lands with "a reasonable degree of certainty" is essentially one of fact. It is a question which, from the very necessities of the case, must, in the first instance, be decided by the Land Department. Considering the nature and character of his duties, the Land Commissioner may be supposed to know, better perhaps than any one else, whether a given description is reasonably certain; and there is a special propriety in committing the question to him for determination. It is doubtless true that the discretion thus vested in that Department may not be arbitrarily exercised. The Land Commissioner may not say that that is a reasonably certain designation which cannot be taken to designate anything at all. But within reasonable limits, it is plain that the decision by one administrative department whether a given description is reasonably certain is as much a decision of a question of fact as is the decision by another administrative department whether a given rate or practice is reasonable; and whether such questions are decided by the Land Department or by the Interstate Commerce Commission, the decision in the absence of fraud or arbitrary action is not reviewable by the courts. *Interstate Commerce Commission v. Illinois Central R. R.,* 215 U. S. 452; *Interstate Commerce Commission v. D. L. & W. R. R. Co.,* 220 U. S. 235;

Interstate Commerce Commission v. U. P. R. R. Co., 222 U. S. 541.

As said by the supreme court in *Burfenning v. Chicago, Etc., Ry. Co.*, 163 U. S. 321-323:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332."

In *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, the Court, speaking of the function of the Secretary with respect to the issuance of patents for indemnity land, said:

> "His action in that matter was not ministerial but judicial. He was required to determine in the first place whether there were any deficiencies in the lands granted to the Company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to in-

quire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed."

Finally the decision of this court in *Groeck v. Southern Pacific R. Co.,* 102 Fed. Rep. 32, 34, is directly in point. This was a suit by the Southern Pacific Railroad Company to declare Groeck trustee of a patent title granted to him under a pre-emption entry, the Railroad Company claiming under its land grant act of July 27, 1866. The land had been selected by the Railroad Company as indemnity and its selection had been rejected because in conflict with the pre-emption claim of Groeck. The Court said:

> "Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the secretary of the interior whenever the grantee thereof complies with the directions which the secretary has published for the regulation of such selection. The secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed. Nor has the secretary in this instance made any regulation which has injuriously affected the right of the grantee. *He had the power to prescribe in advance the method of making such selection, and, having prescribed it, and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act."*

A determination that the description in question designated the land with a reasonable degree of certainty will hardly be called an arbitrary one. To call it this would be to accuse Congress itself of arbitrary action.

The act of July 1, 1898, provides in terms that "all selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made." (30 Stat. 620.) The possibility of identifying lands according to the description by which they will be known when surveyed is here distinctly recognized; and surely no court can say that that description is under one law so inadequate as to be arbitrary, which under another law was recognized by Congress itself as being so appropriate that it was specifically required.

Nor is it difficult for anyone, acquainted as every member of this court is with the legislation affecting public lands in the Western states, to understand why that form of selection should have been specified and required. Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised. Situations may of course be imagined where lands are so remote from any public survey that this form of designation would give little information as to the locality in which they lie, and as said by the court below (R. 82), it might well be held that as to lands so situated such a designation would not be reasonably certain. But in the present state of public surveys such situations are not numerous—certainly not along the lines of the land grant railroads; and for many years settlements on unsurveyed lands within the boundaries of the grants to those railroads have been made with direct reference to the description by which they should be known when surveyed. The grants to the railroad companies included all odd numbered sections, whether surveyed or unsurveyed, which at date of definite location were free from any claims or other rights; and the settler knew when initiating a settlement that if the land settled upon proved to be an odd-numbered section, he must

relinquish it to the railroad company. Knowing this, he has made his settlement with direct reference to the public survey.

To say that when the adjacent township lines have been run, it is impossible or even difficult to determine with reasonable certainty where a given section will lie, is to fly in the face of facts with which most residents of the Western states are familiar. As already stated, when, on June 21, 1901, the railway company filed the selection list in question, the southern line of township 45 North, range 3 East had been run. Suppose that, instead of selecting a tract of land "which, when surveyed, will be described as section 20, township 44 North, range 3 East," the railway company's description of the tract thus selected had been as follows: "Commencing at a point distant three miles due south from a point on the south line of township 45 north, range 3 east, one mile east of the southwest corner of said township; thence due east one mile; thence due south one mile; thence due west one mile; thence due north one mile to the point of commencement." Here we have a "metes and bounds" description, and as such it would satisfy appellant's objection. Yet can anyone doubt that the description actually used by the railway company means the same thing? Or can it be doubted that anyone interested in the lands would gather that meaning from it? And is it not apparent that in marking the boundaries of the land involved in this suit, the party from whom appellant purchased had himself defined or marked them by exactly that kind of anticipatory identification of them with the official survey which appellant now says was impossible? The testimony of the witness who helped to mark these lines is that the southwest corner of township 9 north, range 3 east, having been run, they "carried their lines in from the south line of that township," and "under-

took to tie them up to the government lines." (R. 34.) It was lines so run that the appellant found blazed upon the land when he went into possession in 1903. (R. 28.) Doubtless these blazed lines were not exactly coincident with the official survey lines as finally determined; and it is possible (though less likely), that such a metes and bounds description as we have supposed above would not coincide exactly with the lines of section 20. The corrected list in the one case and the application to make homestead entry in the other would definitely determine the land claimed. But it is clear that the language by which the Railway Company "designated" the land selected was the perfectly definite and intelligible equivalent of the best metes and bounds description that could have been devised; and it is surely no objection to it that it describes or indicates lines which *must* coincide with the lines of the official survey, instead of lines which might not do so.

We proceed now to notice certain points made in appellant's brief.

1. Counsel's main reliance throughout has been on the decision of the Secretary of the Interior in the case of *F. A. Hyde, et. al.,* 40 Land Decisions, 284. This decision is quoted *in extenso* in appellant's brief (p. 9-12), and it is safe to say that had it not been rendered this suit probably never would have been begun. Now, as said by the Secretary in the recent case of *Frank O. Daniels v. Northern Pacific Ry. Co.,* decided August 3, 1914, even in the *Hyde* case "it was unequivocally held that such a description was valid as against the government;" but it is undeniable that the general trend of the argument in it does support appellant's contention; and were it not for the recent

decision of the Department in the case of *Daniels v. Northern Pacific Ry. Co.,* supra, we should be addressing this court, as we addressed the court below, under the disadvantage of having that decision against us. But by his decision rendered August 3, 1914, in the *Daniels* case, the Secretary has expressly overruled the decision in the *Hyde* case, and, following the decision of Judge Dietrich in the present case, has held unequivocally that a designation of unsurveyed land according to the description by which it will be known when surveyed does identify the land described with a reasonable degree of certainty and is a full compliance with the requirements of the Act of March 2, 1899. We print in full the Secretary's decision in the *Daniels* case as an appendix to this brief.

2. Counsel say (p. 13) that "both the Commissioner of the General Land Office and the Department of the Interior have, without exception, followed the construction contended for by appellant as to the Act of March 2, 1899, and other kindred acts in all matters pertaining to lieu selections, with the single exception of the decision in appellant's case."

This statement is not correct. The truth is that in no case, except the case of *F. A. Hyde,* supra, has that construction been followed. As said by the Secretary in the *Daniels* case, *supra,* "the practice of describing unsurveyed lands in terms of a future survey thereof *has been in existence for many years* and was never challenged prior to the decision of *F. A. Hyde,* et. al."

Again in the case of *Hanson v. Northern Pacific Railway Company,* 38 Land Decisions, 491, the lands selected had been described in terms of a future survey and the validity of the selection was questioned on the ground that such a selection did not comply with

the requirements of the regulations of Nov. 3, 1909. The Secretary said, however, "that the practice of allowing selections by the Railway Company as these selections were made, *had been of such long standing and such uniform practice* that it would be unfair, if not illegal, to give retroactive effect to such regulations."

3. Speaking of the fact that the act of July 1, 1898, specifically authorized such selections as those here in controversy and that the Act of March 2, 1899, did not, counsel say:

> "If Congress had intended to continue to grant to the Railroad Company the right to make lieu selections by simply filing lieu selection lists, describing the lands according to what they might be when surveyed, it is clear they would have continued the use of the language found in the Act of July 1, 1898, above quoted. The fact that Congress has expressly discarded the phraseology employed in the Act of July 1, 1898, and employed language which was so plainly in conflict with the regulations of the Department promulgated under the Act of July 1, 1898, clearly manifests that they could have had no other object or purpose in view that that of annulling the practice theretofore established of permitting the Railroad Company to make lieu selections by describing the lands according to what it would be when the survey was made. In other words, subsequent to July 1, 1898, and prior to or at the time of the passage of the Act of March 2, 1899, Congress must have been informed of the conflicts arising between the settlers and the Railroad Company by reason of the practice of the Railroad Company under the Act of July 1, 1898, and have used the language found in the Act of March 2, 1899,

> for the express purpose of avoiding any further conflict between the settler and the Railroad Company."

How extremely tenuous is this argument will be apparent to the court when it is remembered that the "regulations of the Department promulgated under the Act of July 1, 1898" were not promulgated until February 14, 1899. (28 L. D. 103). The idea that within the sixteen days intervening between February 14, 1899, and March 2, 1899, conflicts arose between settlers and the Railroad Company and were brought to the attention of Congress, moving that body to alter the language of the Act of 1898, will hardly be considered seriously by anyone.

4. Counsel argue that because the Act provides for the filing of a second list after survey in case the description in the first list does not precisely conform to the lines of the official survey, it is therefore apparent that description in the original list in terms of future survey was not contemplated. This argument is answered so completely by the court below that we cannot do better than quote what is said by Judge Dietrich:

> "By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, 'In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.' It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustments. *The argument rests wholly upon*

> *the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted.* The Act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that in the selection list the land shall be designated with 'reasonable degree of certainty;' the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here."

5. Counsel speak of the Act of March 2, 1899, as a "grant," and they invoke the rule that public grants shall be construed strictly against the grantee. As pointed out by the court below (R. 85), the Act was not a grant, nor has the Department ever so regarded it. The following language quoted by the court below from the decision of Assistant Secretary Pierce in *State of Idaho v. Northern Pacific Railway Company,* 37 L. D. 135, 138, undoubtedly places the right construction upon it:

> "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land grant act). A voluntary conveyance by the Railway Company was the most feasible method of re-acquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly

expressed are not to be lightly imposed after acceptance of the offer."

Counsel insist, however, (p. 18) that the Act of March 2, 1899, "is a grant in fact"; and they add that "the Honorable Commissioner of the General Land Office has so construed this very act," citing *Northern Pacific Railway Company,* 40 L. D. 441. We know of no such decision of the Commissioner of the General Land Office. If there is any such, counsel should state where it is to be found. If by the citation, in this connection, of the case of *Northern Pacific Railway Company,* 40 L. D. 441, they mean that any such construction was given to the Act in that decision, they are distinctly in error. That was a decision, not of the Commissioner of the General Land Office, but of the First Assistant Secretary of the Interior. It had nothing to do with the question whether the Act of March 2, 1899, was or was not a grant. It dealt solely with a contention of the railway company that areas within Mt. Ranier Park, which were covered by glaciers, might be accepted as bases for lieu selections under the Act of March 2, 1899, and it rejected the contention. This was the sole question before the Department and beyond the decision of it the opinion does not go.

6. Counsel see "the hand of the railroad company" in the drafting of the act "for the reason that while the railroad company is given the right to select from the surveyed and unsurveyed public lands of the United States, the settler upon the lands sought to be set aside as the Mt. Ranier National Park is granted, in lieu of his rights, the right to select only surveyed lands." (Appellant's Brief, p. 19.)

Counsel are wrong, not only as to their inference, but as to the ground on which they rest it. It is not true that the settler is given the right to select only surveyed lands. He has the same right to select unsurveyed lands that is possessed by the railway company. The Act provides specifically that "any settlers on lands in said National Park may relinquish their rights thereto and take other public lands in lieu thereof *to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.*" The conditions "provided by law for forest reserves" are those named in the Act of June 4, 1897, (30 Stat. 11, 36); and as we have seen that Act allows of the selection by the settler of land either surveyed or unsurveyed. *F. A. Hyde,* 28 L. D. 284.

7. At page 30 of their brief, and apparently as a kind of makeweight, counsel suggest, rather than argue, that the Northern Pacific Rail*way* Company had no right to select lands under the Act, because the right of selection was given only to the Northern Pacific Rail*road* Company. That the rail*way* company is the legal successor of the rail*road* company they do not deny. The patent contains an express recital that it is; the Attorney General has ruled that it is (21 Opinions Attorney General, 486; 25 Opinions Attorney General, 401); and this court (177 Fed. 804) and the Supreme Court of the United States (228 U. S. 482) in the case of *Northern Pacific Railway Company v. Boyd,* after a full examination of the foreclosure proceedings, ruled to the same effect; for though both courts held that there rested upon the rail*way* company an obligation to discharge the indebtedness of the old company to non-assenting, unsecured

creditors, it was distinctly held (228 U. S. 502) that the property of the old company was "transferred to a new company" and that the transaction was "binding between the parties." Under these circumstances the contention must be—and as already stated, what it actually is we can only surmise, for counsel have not argued the point—that the offer of exchange was a personal one to the rail*road* company alone.

But when considered in the light of the circumstances attending its passage and approval, it is apparent that the Act is not so limited. As stated above, it was in no sense a grant. It was an offer to exchange lands. Rights were outstanding in certain territory which the government wished to obtain; and for them, it was willing to give other lands of equal area in exchange. It could not care from whom it obtained these rights or who got the lands given in exchange for them. When the Act of March 2, 1899 was passed the foreclosure proceedings by which the rail*way* company has succeeded to the property and franchises of the rail*road* company had long since been concluded; and Congress knew this, for, in the Act of July 1, 1898 (30 Stat. 621) it had referred to the foreclosure proceedings, and had provided that the question of the railway company's successorship, should it ever be raised, should be determined wholly without reference to the provisions of that act. It knew, as that act shows, that the rail*way* company possessed and asserted the right to dominion over the property and franchises of the rail*road* company. Therefore, as said by the court below, "unless we hold either that by

inadvertence the rail*road* company was named while the rail*way* company was intended, or that the privilege conferred upon the rail*road* company is assignable, plainly the Act (of March 2, 1899) becomes wholly ineffectual for any purpose."

The decree of the court below should be affirmed.

CHARLES W. BUNN,
CHARLES DONNELLY.

APPENDIX.

DEPARTMENT OF THE INTERIOR, WASHINGTON.

August 3, 1914.

D-16944.

FRANK O. DANIELS, vs. NORTHERN PACIFIC RAILWAY COMPANY.	"F" Lewiston—2710. Contest affidavit rejected. Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE.

Frank O. Daniels has appealed from the decision of the Commissioner of the General Land Office dated May 12, 1911, rejecting his affidavit of contest against the selection by the Northern Pacific Railway Company for the S½ of the NE¼, N½ of the SE¼ Section 30, 42N., R. 4 E., B. M., Lewiston, Idaho, Land District.

The railway selection involved in this proceeding was filed in the local office on July 11, 1901, under the provisions of the act of March 2, 1899 (30 Stats., 993). It embraced the SE¼ of the NE¼, and the NE¼ of the SE¼, Section 30, but not the SW¼ of the NE¼ and NW¼ of the SE¼, said section, as alleged in the affidavit of contest and in the appeal.

The western boundary of this township was surveyed between July 29 and August 2, 1903; the northern, southern and western boundaries in April and May, 1905, and the subdivisional lines were run during September, 1905; the township plat of survey was filed in the local office on July 1, 1909, and on July 28, 1909, the railway company filed a rearranged list describing the land, under the survey as in its original selection tendered in 1901.

On July 1, 1909, the date on which the plat of survey was filed in the local office, Frank O. Daniels tendered his homestead application for the S½ of the NE¼ and the N½ of the SE¼, section 30, Tp. 42 N., R. 4 E., B. M., alleging settlement on August 10, 1904, continuous residence since that date and sundry improvements. The local officers rejected this application as to the SE¼ of the NE¼, and the NE¼ of the SE¼, for conflict with the railway selection. From this action Daniels appealed and subsequently filed an affidavit of contest against the selection alleging, in addition to settlement, residence, and improvements on and after August 10, 1904, that the selection was illegal and void, inasmuch as the company had wholly failed to post notice thereof on the land, and that he had had no notice, actual or constructive, of the selection at the date of his settlement. The local officers rejected this affidavit of contest upon the ground that it stated no cause of action. The Commissioner affirmed their decision and Daniels' appeal brings the matter before the Department.

The act of March 2, 1899, *supra*, provides, in Section 3, that upon the filing of a proper deed of release or conveyance to the United States of a tract of its granted land within the Mount Ranier National Park, the Northern Pacific Railway Company is authorized to select an equal quantity of non-mineral public land, so classified at the time of survey. In Section 4, it is provided that:

> "In case the tract so selected shall, at the time of selection, be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within a period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by the said local land office, a new selection list shall be filed by said company describing such tract according to such survey."

It is clear that the act, as to unsurveyed lands calls for a description at the date of selection, describing and designating the selected tract with reasonable certainty, and that the reasonable certainty of the description is dependent upon facts in existence at the date of selection. In order to dispose of the question raised by this appeal, it will be necessary, therefore, to consider, first, the several acts of Congress permitting settlement upon, location and selection of unsurveyed public lands and the nature of the right acquired by such settlement, location or selection; second, the requirements of the land department as to descriptions of unsurveyed lands selected, located, or entered; third, the sufficiency, under said act of March 2, 1899, of the description given in this case by the railway company, it being conceded that the only description furnished by the company in its original selection list was that the land when surveyed would be the SE¼ of the NE¼ and the NE¼ of the SE¼, Section 30, Tp. 42 N., R. 4 E., B. M., Idaho; and fourth, was the selected tract non-mineral public land, so classified at the date of survey.

Congress has passed a number of acts permitting the location of scrip upon public lands for the purpose of satisfying and extinguishing legal or equitable claims, among which the most important are those of July 17, 1854 (10 Stats., 304), and of April 5, 1872 (17 Stats., 649).

The act of March 3, 1877 (19 Stats., 377), known as the Desert Land Act, required that the declaration provided for shall particularly describe the land, if surveyed and, if unsurveyed, shall describe the same as nearly as possible without a survey. Under the provisions of this act and of the amendatory act of March 3, 1891 (26 Stats., 1095), desert land entries of unsurveyed lands were made until the passage of the act of March 28, 1908 (35 Stats., 52).

The act of February 8, 1887 (24 Stats., 388), provided for the allotment to Indians of unsurveyed lands.

The act of June 4, 1897 (30 Stats. 11, 36), provided:

> "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent."

The act of July 1, 1898 (30 Stats., 597, 620), authorizes selection by the Northern Pacific Railway Company of unsurveyed land in "odd-numbered sections, to be identified by the survey when made." This act also permits a *bona fide* settler upon lands to which the railway grant had attached, to relinquish his claim thereto and make a lieu selection. This act was amended by the acts approved March 3, 1901 (31 Stats., 950), and May 17, 1906 (34 Stats., 197), which do not affect the selection of unsurveyed land. Following the act of July 1, 1898, *supra,* came the act under which this selection was made, and the act of April 21, 1904 (33 Stats., 189, 194), for the selection by the Turtle Mountain Indians of vacant land belonging to the United States.

Early in the history of these acts permitting location and selection of unsurveyed land, the Department was called upon to define the nature and extent of the interest acquired by the locator or selector. The principle was announced by the Supreme Court of the United States in Frisbie v. Whitney (9 Wall., 187); Yosemite Valley case (15 Wall., 77); and Buxton v. Traver (130 U. S., 235) to the effect that no portion of the unsurveyed public domain, except in special cases not affecting the general rule, is open to sale. This principle was applied by the Department to a location of Valentine scrip in the case of Henry Bruns (15 L. D., 170), wherein it was held that the act of April 15, 1872, *supra,* conferred upon Valentine, or his representatives, the right to select—

> "public lands of the United States, in legal subdivisions whether surveyed or unsurveyed. * * * *

and thus to initiate an inchoate right to purchase said land in preference to other when it was surveyed and came into market, in the same manner that a settler by the occupation of a tract of land acquires a preference right to purchase the same by taking the proper steps after the filing of the township plats. But it did not deprive Congress of the power to make any other disposition of the land before it was offered for sale, nor did the United States by these acts enter into any contract with the settler or locator, or incur any obligation to any one that the land so occupied or located should ever be offered for sale. * * * *

The filing of this scrip upon unsurveyed land does not segregate the land covered thereby, nor is it such an appropriation of the tract as will prevent others from initiating claims thereto, upon the same principle that more than one settlement may be made and more than one declaratory statement filed for the same tract.

These inchoate rights are all subject to the right of the prior claimant, and, if he fails to perfect his claim after survey within the time required by law, it is then subject to the right of the next claimant in order of priority."

The controversy under consideration is, therefore, between two preference right claimants, one under the act of March 2, 1899, and the other under Section 3 of the act of May 14, 1880 (31 Stat., 140). From what has hereinbefore been stated it is clear that the preference right of the railway company first attached if the land was subject to appropriation and the selection was in proper form.

The practice of describing unsurveyed land in terms of a future survey thereof has been in existence for many years, and was never challenged prior to the decision of F. A. Hyde, et al. (40 L. D., 284). Prior to the date of that decision the Department had promulgated the regulations of November 3, 1909 (38 L. D., 287), which, in addition to a requirement that applications for unsurveyed land should contain an

approximate description by section, township and range, as it will appear when surveyed, required also a description by metes and bounds with courses, distances and reference to monuments.

Not only have descriptions of unsurveyed land in terms of a future survey been recognized in departmental practice, but, as has been stated, such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land. Indeed, in the instructions of May 9, 1899 (28 L. D., 521), under the act of June 4, 1897, *supra*, was incorporated a provision broad enough to cover all selections of unsurveyed land under any act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable. This rule was applied by the land department to all selections of unsurveyed lands until the adoption of the regulations of November 3, 1909, *supra*. See Hanson, et al., v. Northern Pacific Railway Company (38 L. D., 491), a case which arose under the act of March 2, 1899, *supra*.

The practice of describing unsurveyed lands in terms of a future survey thereof has been followed in many Executive proclamations involving wide areas of public land. See the Proclamations of October 15, 1892 (27 Stats., 1034, 1038); December 20, 1892 (27 Stats., 1049); July 27, 1892 (27 Stats., 1053); September 28, 1893 (28 Stats., 1240); February 22, 1907 (29 Stats., 906, 907, 909, 911); May 10, 1898 (37 Stats., 1771); April 3, 1901 (32 Stats., 1969); March 2, 1909 (35 Stats., 2247).

Congress also, in the act of July 1, 1898, followed the precedent established by departmental practice and sanctioned the propriety and validity of selections in terms of a future survey by specific requirement that the selected lands, under that act, be so described.

The custom of describing unsurveyed lands, as was attempted by the railway company in this case, is founded upon administrative considerations growing out of the method in which the records of the land

department are kept and its business conducted. While the metes and bounds description of selected unsurveyed land should always have been, as it now is, required, it is obvious that without some reference to existing or future surveys, such a description could not be so noted upon the public records, especially the tract books of the local office and of the General Land Office, as to advise the public of the existence of the selection. If a selection of a specific tract, identified by reference to a survey, be filed in the local land office the register and receiver are enabled to note the claim in its appropriate place. If the land be actually surveyed and the plat of survey be on file the selection gives notice to the world of the existence of the claim in the absence of a requirement of law or regulation that notice be given upon the land selected also. This would be also true of a selection in which the tract, under the act of March 2, 1899, *supra*, is described in terms of a future survey, if such selection complies with the requirement of law that the description designate the land with a reasonable degree of certainty. The only notice of selection required by said act is the filing of the list in the local office.

To be of any avail, as notice, it requires no argument to demonstrate that the land must be described in such a way that the fact of selection may be noted upon the record in its appropriate place.

Selection like the one here under consideration having, therefore, the sanction of departmental practice and regulations, of Executive proclamations, and of at least one act of Congress, and having been predicated upon sound administrative reasons, especially that of notice to the land department and of the public of the approximate locality of the claim, the Department will consider the objection that a description in terms of a future survey does not designate the land with a reasonable degree of certainty. Attention has hereinbefore been directed to the act of July 1, 1898, in which Congress required that a selection of unsurveyed land by the railway company should be of "odd-numbered sections to be identified by the survey, when made." It is a fair inference that Congress, in pass-

ing this law was familiar with the practice of the Department in permitting locations and selections under such description, and advisedly ratified and applied that practice to selections under the act. Had such a description as the one involved in this proceeding lacked any element of reasonable certainty, in the judgment of Congress, no such requirement as to the description of selected unsurveyed land would have been placed in the act of 1898. The requirement in the act of 1899, that the land selected be described with a reasonable degree of certainty must be construed in the light of the act of 1898, which was, in fact, a determination by the law-making branch of the Government that a description in terms of a future survey was sufficient and valid.

It is universally known throughout public land states that theoretically a township is six miles square, and that a section is a mile square. The locus of any section within a township with reference to the other sections thereof is likewise a matter of common knowledge. When, therefore, a selection is filed describing the land as "what will be, when surveyed," Section 30, it will be understood as embracing land in a section whose western boundary is the western boundary of the township whose southern boundary is a line one mile north of the southern boundary of the township, and whose eastern and northern bound 5 and 4 miles, respectively, distance from the eastern and northern township lines. If, therefore, at the date of the selection any line of the public survey has been established in the vicinity of the selected land, it is not believed that a selection like the one under consideration lacks, in fact, any element of reasonable certainty. The locus of the section having been ascertained by considering, as the public generally considers, the section line as being one mile long and the township boundaries as six miles in length, the position of a subdivision of section can be readily determined. It is common knowledge also, that when townships are actually surveyed in the field, many of them display marked eccentricities of outline due to reasons not necessary to be here considered. Such eccentricities might be so

marked as to throw section 30, for example, when surveyed, entirely without its theoretical boundaries with reference to the nearest surveyed township. Such a contingency, however, would have no bearing on the rule hereinbefore announced though it would render necessary an adjustment of the selected tract to its appropriate description under the plat of survey.

The Department is convinced that when in this case, the selection was filed in the local office, describing the land sought as what will be when surveyed the SE¼ of the NE¼ and the NE¼ of the SE¼, Section 30, T. 42 N., R. 4 E., B. M., the register and receiver and every person who took pains to examine the list understood that the western and eastern boundaries of the tracts selected were, respectively, three-quarters of a mile and a mile east of the western boundary of the township and that its southern and northern boundaries were one and a quarter and one and three-quarters miles north of the southern township line.

By reference to the plat of survey of township 42 N., R. 4 E., B. M., Idaho, it appears that none of the township boundaries had been surveyed when this selection was filed. The southwest corner of the township, however, had been fixed in July, 1899, through the survey at that time of the southern boundary of township 42 N., Range 3 E., B. M. There was in existence, therefore, at the date of the selection, a monument of the public surveys within less than two miles of the land under consideration. More than a year before the date of Daniels' alleged settlement upon the land now claimed by him, the eastern boundary of this township was surveyed, and by running the line from the south end of this township line, due west to the ascertained southwest corner of the township, Daniels could have discovered that the distance was exactly six miles. The precise locus of the land selected by the railway company, could, therefore, not only have been found to a reasonable certainty at the date of the selection, but fixed to a mathematical certainty at the date of Daniels' alleged statement.

In the case of *Andrew West v. Edward Rutledge Timber Company and Northern Pacific Railway Company*, decided by the District Court of the United States for the district of Idaho, northern division, on July 22, 1913, involved land in this vicinity and a selection by the railway company under the act of March 2, 1899, it was held that a description like the one here under consideration was, in effect, a metes and bounds description and fully complied with the requirement of the law that the selected land should be described with a reasonable degree of certainty.

It has been urged with great force and earnestness that a description of land in terms of a future and non-existent survey is a nullity and that, therefore, a selection so describing the land is wholly void. This position is entirely without support in any case adjudicated by the land department. Even in the case of F. A. Hyde, et al. (40 L. D., 284), cited and relied upon by the appellant, it was unequivocally held that such a description was valid as against the Government. If it was a good description against the Government, as it was, and if it conformed to a long and well-established practice and was accepted by the land department as sufficient, it initiated a claim to the land which cannot be ignored in favor of a claimant subsequent in point of time.

It is urged that the field notes of survey of this land do not in express terms classify it as non-mineral. It is customary for surveyors, in their returns, to designate mineral lands as such, and all land not classified as mineral by them is regarded as having a non-mineral or agricultural classification. This rule is so well understood by surveyors and by officers of the land department that land not returned as mineral is held to be as effectually classified as agricultural land as if so returned in the field notes. It must be assumed that this rule, frequently referred to in the decisions of the land department, was known to Congress when the act of March 2, 1899, was passed. It could not have been the purpose of Congress to confer upon the railway a right of selection incapable of exercise upon any land then surveyed, practically none of which had

been in express terms classified as agricultural and incapable of exercise upon any land to be surveyed in the future under the administrative rule, above referred to.

After mature consideration the department is constrained to hold that selections of lands made prior to the adoption of the regulations of November 3, 1909, *supra,* describing the tracts in terms of a future survey and accepted by officers of the Department pursuant to its regulations and practice confer upon the selector a preference right to the lands upon their identification by actual survey. If, as is alleged, the selections were not noted upon the records by the local officers, such default on their part did not affect the right of the railway company, which was complete when they had fulfilled the law's requirements. The case of F. A. Hyde, et al. (40 L. D., 284), and all others in conflict herewith are accordingly overruled and the decision appealed from is affirmed.

A. A. JONES,
First Assistant Secretary.